

Concerning the Interloquitor in the Action of Reduction upon Minority and Lesion, at the instance of the Duke and Dutcheſs of *Monmouth*, againſt the Earl of *Tweedale* and his Lady.

Preſident *Stairs* having then great Power and Influence in the Judicatory, was ſo devoted to the Duke and Dutcheſs of *Monmouth*, that both he and his Son Sir *John*, were Commiſſioners in ordering and managing Their Eſtate here; And the ſaid Sir *John*, was their Advocate in that Proceſs.

The Lord *Melvil* preſuming upon that Interdeſt, and the intimate Friendſhip he had with the Preſident, and having the managing of that Eſtate, the Friends of the Name and Family being laid aſide, to endear himſelf and his Service as more concerned for their Interdeſt than all the Friends Curators, and Commiſſioners, and Lawyers; and His late Majeſty Himſelf, who had interveened in the tranſaction with *Tweedale* and his Lady, both as Arbiter; And there after as Party and Garrantee, and taken burden that it ſhould not be queſtioned upon pretence of Minority: He did after they were of perfect Age, adviſe that the ſame ſhould be queſtioned by a Proceſs of Reduction at her inſtance upon the reaſon of Minority and Norm Leſion, and did inſiſt in the ſame, until one Interloquitor was obtained, which was in effect a ſentence as to the moſt material points, being in *Jure* and *Relevancie*. So that there needs no probation of the ſame.

Reductions of tranſactions ſo ſolemn, are ſo unfavourable, that if the perſuers after they are of Age, do ratifie the ſame, either expreſly or tacitly by making uſe thereof, or doing any Act that may import the leaſt homologation and acquieſſing thereunto, they are ſo concluded, that the Allegiance of homologation, is relevant and eleids any Proceſs of Reduction; and yet Alleadgiance of homologation founded upon the Duke and Dutcheſs their giving Warrant after they were of perfect Age, to their Commiſſioners, to call for the Money due by *Tweedale* upon the ſaid tranſaction, and another homologation founded upon an Alleadgiance proponed by the Duke and Dutcheſs, their Advocates, in a Proceſs betwext them and a third Perſon upon the right of *Haſſindean*, given to them by *Tweedale* upon the ſaid tranſaction, were both repelled. The firſt, upon pretence that nothing had followed upon the ſame. And the Second, becauſe the Duke and Dutcheſs recovered no benefit upon the ſaid Alleadgiance, which pretences were moſt friſulous, ſeeing Law doth not conſider whether any thing follow upon ſuch homologations, or whether any benefit was recovered thereupon, but whether homologations did follow upon the tranſactions queſtioned, and perſuites and defences founded upon tranſactions in Law, are pregnant ratifications the ſame, *Et qui accepit agit.*

By the ſaid Interloquitor, it is found, that *Francis* Earl of *Buccleugh* being named by his Father, *Walter* Earl of *Buccleugh*, Executor and Univerſal Intromettor, without any mention of a Legacy left to him, was nevertheleſs Univerſal Legator as to the Deeds part, upon pretence that the Deſunct did appoint the Tutors to apply the readieſt of the Earl's Goods, Geire, and Rents, for ſatiſfying his Debts; by which Article of the Interloquitor, the half of the Lady *Tweedale*'s Interdeſt, and ſhare of her Fathers Exequetrie is cut off without any Warrant or Ground in Law, ſeeing Univerſal Legacies in prejudice of Children, and neareſt of Kin are always, and ought to be in clear and in direct and formal words, *viz.* That a Perſon ſhould be named Univerſal Legator, or that the Deſunct ſhould expreſly leave in Legacy to him his part, or in ſuch like words; Whereas the ſaid Earl *Walter*, who was in that quality, that in making his Teſtament, he could not want the advice of Lawyers and Writers, that knew the form and conception of Teſtaments, and Univerſal Legacies, did name his Son his Executor and Univerſal Intrometor, without leaving to him any Legacy, either particular, or Univerſal: And the ſaid

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Clause anent his Goods, and applying the Rents to the use aforesaid, is only an Order and Direction to the Tutors, to manage so his Estate, that the Rents should be applied in manner aforesaid ; and that they should be comptable yearly, to that purpose.

By the said Interloquiter, there is a great part of the Lady *Tweedale* Her Claim and Share in her Fathers Exequetrie cut off, in so far as it is found that Annual rent is not due, for the Sums contained in a Decreet obtained immediately after ; And in pursuance of the said Transaction, at the instance of the Lady *Tweedale* against the Duke and Dutcheß ; Albeit, the said Sums being due to the said Lady, as Executrix to *David* Her Brother, it was found most justly by the said Decreet. Upon a full debate in *Foro*, that Annual rent was due for the same, until the death of *David*, in *Anno* 1648. In respect the said Sums ; *David* being Pupill and Minor, was not only *pecunia Pupillaris*, but was in the hands of the said Earl *Francis* and his Tutors, and applied by them for payment of the said Earls Debts and Annual rents; and he having that use and benefit of *David's* Money Annual rent, was therefore due not as *usura* but as *interesse*, because *nemo debet locupletare cum aliena jactura* ; And it was a favour to the Duke and Dutcheß, that Annual rent was only decerned until the time aforesaid, and not until the Date of the said Decreet in *Anno* 1667. And there after until payment, seeing Annual rent being once due and currant; and the same reason continuing, *viz.* that they had the use and benefit of the Money belonging to *David*, and the Countess, in his Right Annualrent continued to be due, and could not sist until payment.

There was due to Lady *Mary Scott*, one of the Bairnes and nearest of Kin to the said *Walter* Earl of *Buccleugh*, her part of his Exequetrie and movable Estate, but she being deceased before the Lady *Tweedale* was Married, her part aforesaid fell and belonged equally to the Lady *Tweedale*, and *David* her Brother, who did survive the Lady *Tweedale* her Marriage ; and the Lady *Tweedale* having by her contract of Marriage, discharged and renounced that which might have fallen to her by decease of the said Lady *Mary*, and the said *David* having thereafter deceased, that which fell to him of the said Lady *Mary* her part, did by his death accrew and belong to the said Lady *Tweedale*; and albeit the subject of all dispositions and renunciations of what may fall to any Person by the decease of another, is limited and understood to be that which had fallen to them at the time of their renouncing and disposing the same, seeing what, after such rights doth fall to them, was not existing, and is *non ens*, and not *cogitatum* in the time of such renunciations : And what is given to them for the said rights, is only given proportionably and with respect, and in contemplation of their present Right ; and not of that which did not then belong to them, not so much as in spe or appearance but to another ; and for the reason aforesaid, it was found by Decreet above-mentioned in *Foro*, that the Lady *Tweedales* renunciation of that which may fall to her by Decease of the Lady *Mary*; could not be extended to that which she had not at the time of the Contract of Marriage of the Lady *Marys* part, and which did thereafter, fall and accrew to her by the supervenient death of the said *David*; yet it was found by the said Interloquitor, that the Lady *Tweedale*, her discharge and renunciation in her contract of Marriage, doth seclude her from any part of Lady *Mary* her Means.

The aforesaid debate mentioned in the Sections, immediately preceding, concerning the said Universal Legacy in favours of *Francis* Earl of *Buccleugh*, and Annual rent of the Sums due to the Lady *Tweedale* and Lady *Mary*, her part that fell to her, after her Contract of Mariage and Renunciation being in *apicibus juris*, and *agitat*, and decided by the aforesaid Decreet in *Foro*, in favours of the Earl of *Tweedale* and his Lady ; Nevertheless, the Alleadgiance proponed by them, and founded unanswerably upon the said Decreet, was repelled by the aforesaid Interloquitor, and the Duke and Dutcheß reponed against the same, upon these pretences, mentioned in the Interloquitor, *viz.* First, that the said Decreet was pass'd in order to the said Transaction betwixt the Duke and Dutcheß, and *Tweedale* and his Lady. And Secondly, That it was during their Minority ; Whereas, to the said first pretence, seeing that it was not pretended that it was given unjustly, the passing of it in order to the said Transaction, should have rather been a motive for sustaining the same as unquestionable, in respect it is the ordinary and the great security of the People, and the Interest of Minors, that Transactions and Bargains may be made with

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with them, when there is a necessity to sell or dispose of their Lands or Goods, or to Transact for avoiding inextricable Pleas; and therefore besides their Tutors, and Curators of their Parents, of their own choice, the Law provides for obviating all suspicions of Fraud and Lesion, that such Transactions and Bargains concerning them, should be Authorized by Decrets of the Ordinary Judges, and *ex Religione & autoritate Judicis*; it is presumed, *presumptione juris*, that Transactions Authorized by Decrets, are without any Lesion, and just, and for the advantage of Minors, and ought to be unquestionable, otherwise, that severity (both to Minors and others, who contracteth with them *de rebus minorum sine Decreto, non alienandis* introduced by the *Common-Law*, and the custom of this and other Nations) should be altogether ineffectual and to no purpose.

The pretence of Minority for reponing the Duke and Dutchess to their defences against the said Decree; and in special, anent the points aforesaid is most frivolous and unwarrantable, in respect they could not be reponed to any defences, but such as were omitted for them: whereas their defences, as to the said particulars, was not omitted, but vigorously and fully proponed and argued, and the Judges Sentence following upon a full debate, cannot be said to be any deed or omission of Minors through the frailty of their age, being the deed and decision of the supreme Judge, which is presumed to be, and ought ever to be just, whatever the quality or age of the Persons concerned, or Pleading before them be: And there can be nothing more derogatory to the Honour and Justice of Courts then that their decisions in Jure, which are ever *eidem*, should be unjust against Minors; and *super iisdem deductis*, there should be contrary decisions upon no other pretence, but that they were Minors when the former was given.

It is found by the said Interloquitor, that His Majesties interposition in the said Transactions can have no effect if it should appear by the event of that Process, that the matter was not sufficiently represented to His Majesty, which appears to be very strange and unwarrantable, both as to the form and matter, seeing the question whether His Majesties Interposition should be effectual or not, was not then, nor could be under debate, unless there had been a reduction intended in behalf of His Majesty, for reducing the late King His Obligation, whereby he became Garrantee, and took burden, and was obliged that the Duke and Dutchess should ratifie at their perfect Age, which by the said Interloquitor, is extended^{uati} to be but ~~one~~ Interposition, tho' it be a most clear and pregnant Obligation; And the King in the said Process, wherein the said Interloquitor is given, is not Party either as Persuer or Defender, and intimation is only made to his Advocate of the said Process, which is of course, and ought to have been done in Law and Form by *Tweedale* and his Lady: And as to the matter if the said discharge and Obligation, had been questioned by a Libelled Summons, and Reduction in behalf of His Majesty upon that pretence, that the time of the said Transaction, the matter was not sufficiently representing to His Majesty; the Lord and Lady *Tweedale*, would have had a most relevant defence to elide the same, *viz.* that His Majesty being Major and Sciens, and prudent did take burden for the Minors, and did oblige himself in manner aforesaid; and should have considered then, whether the matter was sufficiently represented, and if he did not, it was not *Tweedale* nor his Ladies fault, nor could be a ground of Reduction of the Kings Obligation; but the mistake in the said Interloquitor was, that it was not considered that there was a great difference betwixt His Majesties acting in His Royal capacity, and giving Grants and Gifts to His Subjects, and His Majesties acting as *privatus* and *cui libet* in Contracts and Transactions, and as a Party, and obliged for performance of the same; seeing Royal Favours and Grants may be, and are often elicited by suggestion and misrepresentation, by subreption or obreption, which is never thought to be incident to Transactions or Obligations, which are the result of Treaty and Debate, and great deliberation: And as a private Person could not without absurdity, pretend to be free of a Transaction or Obligation to Warrant the same, upon so frivolous a pretence, that the matter was not fully represented; much less the Transactions and Obligations of Princes can be questioned upon the same, seeing above all others in Their Transactions, *Bona Fides*, and Justice and Honour is said to Exuberat. And it is not conceived that upon the event of a Process so long after it can appear that the matter was not fully represented, the time of the said Transaction in respect whatever the Issue

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of the Proceſs be, in Jure it cannot be known by the ſame what was repreſented, the ſaid Tranſaction that being in Fact : And it cannot be thought *Tweedale* and his Lady would not fully repreſent the matter as to themſelves, and their own Intereſt ; and if what did concern the adverſe Party, was not repreſented for them by their Commiſſioners, Curators, and Lawyers, it cannot be imputed to *Tweedale* or his Lady, or enervate the ſaid Tranſaction and the Kings Obligation : But it is not to be preſumed the Integrity and Ability of ſo many Perſons of Quality, that was concerned in the ſaid Tranſaction in behalf of the Duke and Dutcheſs, being conſidered that the matter was not fully repreſented for them ; and it appears by the ſaid Decreet, at the Inſtance of *Tweedale* and his Lady ; ſo ſoon after and in purſuance of the ſaid Tranſaction, that all the ſaid grounds and ſubtilities whereupon the ſaid Interloquitor proceeds, was then fully repreſented.

From the Premiſſes and what is repreſented in the other Paper, given in for *Tweedale* and his Lady, it evidently appears that with great patience and diligence, they have been at great trouble and charge to defend againſt ſo long and tedious a Proceſs, that nothing has been omitted, that could be ſaid or done in the ſame ; and the Duke and Dutcheſs being conſcious that *Tweedale* and his Lady had gotten ſo hard a meaſure, and being content to remit a very conſiderable part of what *Tweedale* would have been forc'd to pay upon the aforeſaid Interloquitor and decreet, that would have followed upon it ; The Earl of *Tweedale* and his Lady by their accepting the ſaid eaſe, and granting a Bond for a far leſs Sum, has done nothing in prejudice of the ſaid Tranſaction ; and by the contrary, if they had not accepted of the Terms aforeſaid, it might have been obtruded to them, that they had prejudged both themſelves and the King. And therefore it is humbly deſired, and expected from His Majeſties Juſtice and Goodneſs, that a courſe may, and will be taken for their Relief conform to the ſaid Tranſaction, and His late Majeſties Obligation.